

Summary of Written Evidence to the Ad Hoc Joint Committee on the Mental Capacity Bill

31st July 2015

NICCY has a number of concerns about the proposed way forward for mental capacity and mental health law in Northern Ireland as currently being progressed under the Mental Capacity Bill for over 16s and a retained and amended Mental Health (Northern Ireland) Order 1986 for young people under 16. These are detailed in our evidence to the Ad Hoc Committee on the Mental Capacity Bill. The following is a summary: –

- The Mental Capacity Bill provides a number of important safeguards and protections for people aged over 16 who lack decision making capacity.
- The exclusion of under 16s from the scope of the Mental Capacity Bill will mean that solely on the basis of age, under 16s will not be able to access the protections and safeguards contained in the Mental Capacity Bill which will be afforded to those over 16 who lack capacity as a result of a mental illness or learning disability. NICCY does not believe that this approach is compliant with the UNCRC, in particular Articles 2 – non-discrimination, 3 – best interests of the child, 6 – right to survival and maximum development, 12 – right to be heard and have views taken into account, 23 – right of a disabled child to a full and decent life and 24 – highest attainable standard of healthcare. NICCY is also concerned that the exclusion of under 16s from the Bill may not be compliant with the UNCRPD, in particular Article 7 - right of children with disabilities to enjoy all human rights and fundamental freedoms on an equal basis with other children and Article 12 - full and equal legal capacity for everyone.
- It is intended to retain an amended Mental Health (Northern Ireland) Order 1986 for under 16s as an interim measure pending a review of the Children (Northern Ireland) Order 1995 to include compulsory powers of detention for mental illness. NICCY is concerned that a review of the Children (Northern Ireland) Order 1995 will also take a long time so it is likely the Mental Health (Northern Ireland) Order 1986 will remain in place for under 16s for the medium to long term. NICCY believes that

in the absence of any consultation on an amended Children (Northern Ireland) Order 1995 it is untenable to exclude all children and young people under 16 from the scope of the Mental Capacity Bill.

- The Principles of the Mental Capacity Bill should return to those recommended by the Bamford Review – Autonomy, Justice, Benefit and Least Harm (**clauses 1 - 8**).
- The Mental Health (Northern Ireland) Order 1986 should include safeguards and protections which are at least equivalent to those which young people over 16 will be able to access under the Mental Capacity Bill. These should include a statutory recognition of the views of carers, restraint safeguards and legal protection to a person providing care or treatment for someone who lacks capacity. These safeguards should be available to both voluntary and detained patients (**clauses 254 - 255**).
- Independent advocacy should be available to all children and young people who require it under both the Mental Capacity Bill and an amended and retained Mental Health (Northern Ireland) Order 1986, when they require it and at their request, both in the community and in a hospital setting. Children should be able to choose their advocate (**clauses 35 - 36, 84 – 94, 255 and schedule 8 para. 3C**).
- The deprivation of liberty safeguards should apply to all regardless of age in compliance with Article 5 of the ECHR, as incorporated by the Human Rights Act 1998 (**clauses 24 - 27**).
- The disregard provision in Article 10 of the Mental Health (Northern Ireland) Order 1986 should be extended to include periods of detention for treatment of a mental illness in childhood and apply to all young people under 18 and retrospectively to anyone detained for treatment as a child.
- The Nearest Relative provisions for under 16s in the Mental Health (Northern Ireland) Order 1986 should be amended to ensure compliance with the ECHR, as incorporated by the Human Rights Act 1998 (**schedule 8 para. 3D**).
- A statutory right to age appropriate and developmentally appropriate accommodation should be included in both the Mental Capacity Bill and the Mental

Health (Northern Ireland) Order 1986 to ensure that no child under 18 is ever admitted to an adult psychiatric ward (**clause 254 and schedule 8 para. 3D**).

- Amendments to both the Mental Capacity Bill and the Mental Health (Northern Ireland) Order 1986 should be made to include strong education provisions that ensure that all under 18s have equal access to education as their peers.
- NICCY welcomes the insertion of a best interests principle into the Mental Health (Northern Ireland) Order 1986 for under 16s. We do not believe that in determining what is in the best interests of the young person sufficient regard is given to taking the views of the child into account. An amendment should be made to the Mental Health (Northern Ireland) Order 1986 so that young people have their views heard, taken into account and given due weight in line with the age and maturity of the child (**schedule 8 paras. 3A and 3B**).
- It is welcome that the new offence of ill treatment or wilful neglect of someone who lacks or is believed to lack capacity will apply to everyone regardless of their age (**clause 256**). As this offence is capacity based it will involve an assessment of capacity in under 16s which the DHSSPS has informed NICCY will be done in accordance with the common law and further guidance in a Code of Practice.¹ **This raises significant questions about the rationale for the exclusion of under 16s from the scope of the civil provisions of the Bill as capacity can and will be assessed in under 16s on a case by case basis. NICCY therefore believes that that there can be no justification whatsoever why under 16s should not come within the scope of the civil provisions of the Bill.**
- There are obvious similarities in the test to remove a person to a place of safety (**clause 137**), a test which is replicated in the power to transfer a person from one place of safety to another (**clause 143**) and the 'lacks capacity' test (**clause 3**) in the Bill. The place of safety test will be applied to everyone, regardless of age and the test for 'lacks capacity' will not due, according to the DHSSPS, to difficulties in assessing capacity in under 16s because of their developmental immaturity. **This raises significant questions about the rationale for the exclusion of under 16s from the scope of the civil provisions of the Bill.**

¹ Correspondence from DHSSPS to NICCY, 30th July 2015.

- Police stations should never be used as a place of safety for a mentally ill young person. NICCY wishes to see this being removed from the Mental Capacity Bill **(clauses 137 – 159)**.
- NICCY believes that if Trust Panels are to be introduced through the Mental Capacity Bill that the Bill should be amended to allow for the introduction of a regional system for Trust Panels to ensure consistency in decision making **(clauses 19 - 34)**.
- It is extremely unclear how the issue of young people under 16 not being included in the civil provisions of the Mental Capacity Bill due to their developmental immaturity can be rationalised with a minimum age of criminal responsibility of 10 and the obligation and consequent assumption of capacity, for young people aged 10 and over to admit guilt and / or give their informed consent in order to avail of certain criminal justice disposals. The tension between these policy positions should be urgently clarified.
- There will be issues around the operation of two pieces of legislation for the care and treatment of children and young people in the criminal justice system based on their age. Since the civil provisions of the Mental Capacity Bill will only apply to young people aged 16 years and above, this may present challenges for staff and young people detained in the Juvenile Justice Centre in relation to their treatment, care and welfare. There will also be implications for criminal justice agencies including the PSNI and the Youth Justice Agency who will have to operate two different systems in the care and treatment of children and young people based on their age. It will be vitally important that staff from all relevant agencies and service providers are fully trained with regard to the operation of both the Mental Capacity Bill, including running the capacity test itself and the Mental Health (Northern Ireland) Order 1986 as amended.
- The lack of an in-patient forensic treatment unit for under 18s in Northern Ireland will limit the practical availability of treatment based court disposals for under 18s and the ability to remand a young person to hospital for examination or treatment. NICCY recommends the urgent provision of an appropriate in-patient forensic treatment facility in Northern Ireland for under 18s so that all young people can access the treatment they require **(clauses 160 – 247)**.

- While NICCY welcomes the inclusion of 16 and 17 year olds within the scope of the Mental Capacity Bill, 16 and 17 year olds are still children and require special protections. In order to adequately protect 16 and 17 year olds in the case of life-threatening emergencies NICCY recommends that the DHSSPS in its Code of Practice replicates section 19.71 of the Code of Practice for the Mental Health Act 1983² which is currently in operation in England and Wales.
- NICCY recommends that an amendment is made to the definition of ‘mental disorder’ under the Mental Health (Northern Ireland) Order 1986 to include conditions caused by personality disorder and conditions related to alcohol or drugs in line with the definition in the Mental Capacity Bill (**clause 292**).
- A lot of the necessary detail regarding the operation of many parts of the Bill has been left to the Codes of Practice, which have not yet been finalised or consulted upon. These must be urgently published and consulted upon so that they can be published at the same time that the legislation is enacted.
- Similarly, a large number of issues in the Bill and the necessary detail will be provided by future Regulations. NICCY has concerns that there may be less scope to influence the content of Regulations and it is vital that there is adequate consultation on the Regulations at the earliest possible stage, including direct consultation with children and young people.
- NICCY is aware that reform of mental health and mental capacity law in Northern Ireland is urgently required and we hope that the Mental Capacity Bill, with the amendments we recommend in our written evidence to the Committee, is progressed before the end of this mandate. However, we have some concerns, given the current advanced stage of the legislative process, that some significant amendments which are intended to be brought forward, including the repeal of Part III of the Mental Health (Northern Ireland) Order 1986 and amendments which are still being considered including the extension of the test for unfitness to be tried to the Youth Court have not been included in the draft Bill. This raises questions about the ability to amend the content of the Bill and to have confidence in its progression before the end of this mandate.

² Mental Health Act 1983: Code of Practice, Department of Health, 2015